

(Billing Code: 4810-31-P)

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Parts 7 and 25

[Notice No. 4]

RIN: 1512-AC11

Flavored Malt Beverages and Related Proposals (2001R-136P)

AGENCY: Alcohol and Tobacco Tax and Trade Bureau (TTB), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of the Treasury and its Alcohol and Tobacco Tax and Trade Bureau are proposing changes to the beer and malt beverage regulations related to the production, taxation, composition, labeling, and advertising of alcohol beverages marketed as "flavored malt beverages." We are proposing these changes in response to the numerous questions raised by the States and others concerning these alcohol beverages.

The proposed regulation permits the addition of flavorings and other materials containing alcohol to malt beverage products only if the alcohol from such materials constitutes less than 0.5% by volume of the finished product. This document solicits comments on other approaches, including one requiring that a majority of a product's alcohol derives from fermentation at the brewery and also seeks comment on the amount of time necessary to comply with the proposed standards.

By proposing these changes, we seek to ensure that flavored malt beverages comply with the requirements of the Internal Revenue Code of 1986 with respect to their composition, premise where produced, appropriate tax rate, and system of distribution. We also wish to ensure the proper classification of these alcohol beverages under the Federal Alcohol Administration Act so that their labeling and advertising conform to the applicable requirements of the Act and to ensure consumers are adequately informed, and not misled, as to the identity of these products. We believe the proposed changes will clarify the status of flavored malt beverages under these two Federal statutes and will provide guidance to the State regulatory and tax agencies that oversee their taxation and distribution.

DATES: Written comments must be received by [Insert date 90 days after date of publication in the Federal Register].

ADDRESSES: Send written comments to: Chief, Regulations and Procedures Division, Alcohol and Tobacco Tax and Trade Bureau, P.O. Box 50221, Washington, DC 20091-0221 (Attn: Notice No. 4). See the **Public Participation** section of this notice for alternative means of commenting.

Copies of this document and the written comments received will be available for public inspection by appointment at the ATF Reference Library, Room 6480, 650 Massachusetts Avenue, NW., Washington, DC 20226; telephone 202-927-7890. Copies of this document and of the comments received will also be posted on the TTB website at <http://www.ttb.gov>. See the **Public Participation** section of this notice for further details.

FOR FURTHER INFORMATION CONTACT: Charles N. Bacon, Alcohol and Tobacco Tax and Trade Bureau, Regulations and Procedures Division, 10 Causeway Street, Room 701, Boston, MA 02222; telephone 617-557-1323.

SUPPLEMENTARY INFORMATION:

Table of Contents

Notes to Readers

- A. ATF–TTB Transition
- B. Use of Plain Language

I. Background Information

- A. What Are Flavored Malt Beverages?
- B. What Is Our Authority to Regulate Beer and Breweries?
- C. What Is Our Authority to Regulate Malt Beverages?
- D. What Is Our Authority to Regulate Distilled Spirits?
- E. Why Are We Concerned with the Production, Labeling, and Taxation of Flavored Malt Beverages?

II. Alcohol Beverage Production

- A. Fermentation
- B. IRC Definition of Beer
- C. What Are Nonbeverage Distilled Spirits?
- D. How Are Flavored Malt Beverages Different than Other Malt Beverages?

III. Flavored Malt Beverages Study

- A. What Was the Study's Intent?
- B. What Were the Study's Findings?
- C. What Conclusions Have We Drawn from this Study?

IV. Establishing a Standard for Added Alcohol

- A. ATF Ruling 96-1

B. Standard for Added Alcohol and Alcohol From Fermentation

C. What is the Significance of 0.5% Alcohol by Volume?

V. Proposed Rule Language for Beer

A. Proposal for Alcohol Flavors in Beer

B. Comments Sought on Beer Definition

VI. Proposed Standards for Flavored Malt Beverages

A. How Does the Presence of Alcohol Flavors Affect Malt Beverages?

B. Proposal for Alcohol Flavors in Malt Beverages

VII. Proposed Alcohol Content Labeling Statement for Flavored Malt Beverages

A. Differentiation of Flavored Malt Beverages from other Alcohol and Nonalcohol Beverages

B. Alcohol Content Statement on Brand Label

C. Form of Alcohol Content Statement and Tolerances

D. Effect of State Law

E. Discussion of Alcohol Content Labeling for All Malt Beverages

VIII. Use of Distilled Spirits Terms in Malt Beverage Labeling and Advertising

A. Background

B. ATF Ruling 2002-2

C. Proposal for Labeling and Advertising

IX. Filing Formulas for Fermented Beverages

A. Current Statement of Process Requirement

B. Regulatory Proposal for Filing a Formula

C. Comments Sought on Formula Proposal

X. Samples

XI. Formulas and Samples for Imported Malt Beverages

XII. Public Participation

A. Comments Requested

B. What Is a Comment?

- C. How May I Submit Comments?
- D. How Does TTB Use the Comments?
- E. May I Review Comments Received?
- F. Will TTB Keep My Comments Confidential?

XIII. Regulatory Analyses and Notices

- A. Does the Paperwork Reduction Act Apply to this Proposed Rule?
- B. Does the Regulatory Flexibility Act Apply to this Proposed Rule?
- C. Is this a Significant Regulatory Action as Defined by Executive Order 12866?

XIV. Drafting Information

XV. List of Subjects

XVI. The Proposed Rule

Notes to Readers

A. ATF – TTB Transition

Effective January 24, 2003, the Homeland Security Act of 2002 (Public Law 107–296, 116 Stat. 2135 (2002)) divided the Bureau of Alcohol, Tobacco and Firearms (ATF) into two new agencies, the Alcohol and Tobacco Tax and Trade Bureau (TTB) in the Department of the Treasury and the Bureau of Alcohol, Tobacco, Firearms, and Explosives in the Department of Justice. The regulation and taxation of alcohol beverages remains a function of the Department of the Treasury and is the responsibility of TTB. References to the former ATF and the new TTB in this document reflect the time frame, before or after January 24, 2003.¹

B. Use of Plain Language

¹ The new Bureau of Alcohol, Tobacco, Firearms, and Explosives continues to use the "ATF" abbreviation and continues to provide some support services to TTB. References to the "ATF

In this document, "we," "our," and "us" refers to the Department of the Treasury and/or the Alcohol and Tobacco Tax and Trade Bureau (TTB). "You," "your," and similar words refer to members of the alcohol beverage industry and others to whom TTB regulations apply.

I. Background Information

A. What Are Flavored Malt Beverages?

In recent years, flavored malt beverages have become increasingly popular and have gained greater market share. These products differ from traditional malt beverages and beer in several respects. Flavored malt beverages exhibit little or no traditional beer or malt beverage character. Their flavor is derived primarily from added flavors rather than from malt and other materials used in fermentation. Flavored malt beverages are marketed in traditional beer-type bottles and cans, and their alcohol content is similar to most traditional malt beverages—in the 4 to 6% alcohol by volume range.

Although flavored malt beverages are produced at breweries, their method of production differs significantly from the production of other malt beverages or beer. In producing flavored malt beverages, brewers brew a fermented base of beer from malt and other brewing material. Brewers then treat this base using a variety of processes in order to remove malt beverage character from the base; i.e., they remove the color, bitterness, and taste that are generally associated with beer, ale, porter, stout, and other malt beverages. This leaves a base product to which

brewers add various flavors, which typically contain distilled spirits, to achieve the desired taste profile and alcohol level.

Although the alcohol content of flavored malt beverages is similar to that of most traditional malt beverages, the alcohol in many of them is derived primarily from the distilled spirits component of the added flavors rather than from the fermentation of malt and other materials. In some cases, as much as 99% of the alcohol in the finished flavored malt beverage product comes from added flavorings containing distilled spirits and not from fermentation in the brewery. Because these alcohol beverages begin with a base of fermented beer, they are made at breweries, taxpaid at the rate applicable to beer, and distributed to the alcohol beverage market through beer and malt beverage wholesalers.

Flavored malt beverages are sold under many proprietary names and include alcohol beverages such as alcoholic lemonades, alcoholic colas, cooler-type products, and other flavored alcohol beverages. In the last two years, brewers have partnered with distilled spirits producers in order to label flavored malt beverages using prominent distilled spirits brand names. Published statistics for calendar year 2001 indicate that flavored malt beverages constitute as much as 5% of the overall U.S. malt beverage market, or as much as 10 million barrels (of 31 gallons each) of the overall malt beverage market of approximately 200 million barrels.

B. What Is Our Authority to Regulate Beer and Breweries?

Beer is taxed under the Internal Revenue Code of 1986 (IRC). The IRC both defines beer and imposes a Federal excise tax on beer removed from a

brewery, or imported into the United States, for consumption or sale. Section 5052(a) IRC defines "beer" as:

* * * beer, ale, porter, stout, and other similar fermented beverages (including saké or similar products) of any name or description containing one-half of 1 percent or more of alcohol by volume, brewed or produced from malt, wholly or in part, or from any substitute therefor.

This statutory definition of beer is restated in our regulations in 27 CFR Part 25, Beer.

This definition of beer originated in the internal revenue act passed by Congress in 1862 to help finance the Civil War and has remained essentially unchanged to the present day. (See § 50 of the Act of July 1, 1862, 12 Stat. 432, 450.) TTB and its predecessor agencies have long relied on this statutory definition in collecting the Federal excise tax on beer. Under IRC § 5051, the current excise tax on beer is \$18 per barrel of 31 gallons, with certain exceptions for qualified small domestic brewers.

The IRC also governs the establishment and bonding of breweries. IRC § 5401 requires a brewer to give notice to the Secretary of the Treasury and file a bond with the Secretary prior to commencing business at a brewery. TTB and its predecessor bureaus have long regulated the establishment and operation of breweries under these statutory provisions.

C. What Is Our Authority to Regulate Malt Beverages?

The Federal Alcohol Administration Act (FAA Act), 27 U.S.C. 211, defines a "malt beverage" as:

* * * a beverage made by the alcoholic fermentation of an infusion or decoction, or combination of both, in potable brewing water, of malted barley

with hops, or their parts, or their products, and with or without other malted cereals, and with or without the addition of unmalted or prepared cereals, other carbohydrates or products prepared therefrom, and with or without the addition of carbon dioxide, and with or without other wholesome products suitable for human food consumption.

This definition also appears in our regulations in 27 CFR Part 7, Labeling and Advertising of Malt Beverages.

The FAA Act gives the Secretary of the Treasury or his designate authority to issue regulations providing the public with information about the identity and quality of malt beverages, and to prevent deception in the labeling and advertising of malt beverages. The FAA Act also requires that persons engaged in the business of wholesaling or importing malt beverages obtain permits. In addition, it requires bottlers or importers of malt beverages to obtain certificates of label approval prior to introducing malt beverages into interstate or foreign commerce. Regulations implementing these FAA Act provisions appear in 27 CFR Part 7, Labeling and Advertising of Malt Beverages.

D. What Is Our Authority to Regulate Distilled Spirits?

Since the early days of the Republic, Congress has levied, and the Treasury Department has collected, taxes on distilled spirits. Today, under provisions of the IRC that define and tax distilled spirits, TTB regulates the production, labeling, and taxpayment of distilled spirits. Under other provisions of the IRC, we also oversee the qualification and operation of distilled spirits plants (DSPs).

IRC § 5002(a)(8) defines "distilled spirits" as:

* * * that substance known as ethyl alcohol, ethanol, or spirits of wine in any form (including all dilutions and mixtures thereof from whatever source or by whatever process produced).

IRC § 5001 imposes Federal excise tax on distilled spirits at the rate of \$13.50 per proof gallon. A proof gallon is one liquid gallon containing 50% alcohol by volume (100 proof) at 60° F.

The FAA Act, at 27 U.S.C. 211(a)(5), defines distilled spirits similarly as:

* * * ethyl alcohol, hydrated oxide of ethyl, spirits of wine, whiskey, rum, brandy, gin, and other distilled spirits, including all dilutions and mixtures thereof, for non-industrial use.

The FAA Act also gives us the authority to prescribe labeling and advertising regulations for distilled spirits.

The FAA Act requires distillers, blenders, bottlers, wholesalers, and importers of distilled spirits to obtain basic permits. It further requires these persons to obtain certificates of label approval for labels on bottles of distilled spirits prior to bottling or releasing bottled distilled spirits from customs custody.

Regulations implementing these FAA Act provisions appear in 27 CFR Part 5, Labeling and Advertising of Distilled Spirits.

E. Why Are We Concerned with the Production, Labeling, and Taxation of Flavored Malt Beverages?

This proposed rulemaking addresses the question: "Should certain products currently marketed as flavored malt beverages be classified as malt beverages or distilled spirits under the FAA Act and the Internal Revenue Code?" The answer to this question affects the rate of tax applicable to them, the premises where they may be produced, the way they are labeled, advertised, marketed, and the distribution system by which they are sold to retailers and consumers. Further, their classification as malt beverages or as distilled spirits may affect State oversight and control of these alcohol beverages.

State regulatory and taxation agencies have expressed concern about flavored malt beverages and have requested that we take action to clarify their status as either malt beverages or distilled spirits. Moreover, through our own examination of these products, we believe that, because of their present formulations, many beverages currently marketed as flavored malt beverages should not be so classified.

This notice proposes significant changes in our regulations issued under both the IRC and the FAA Act.

II. Alcohol Beverage Production

A. Fermentation

Fermentation is the process by which yeast converts sugar into alcohol and carbon dioxide. Both the definition of "beer" under IRC § 5052 and "malt beverage"

under § 211 of the FAA Act focus on fermentation as the source of the alcohol in these products.

B. IRC Definition of Beer

Under the Internal Revenue Code, "fermentation" is the determining criteria for defining beer. In 1869, the Commissioner of Internal Revenue ruled that the term "substitute for malt" within this definition includes other fermentable substances such as rice, grain of any kind other than malt, sugar, bran, and glucose. In re-enacting the Internal Revenue Code in 1954, Congress specifically included saké, a fermented rice-based beverage, and products similar to saké within the definition of beer for production and taxation purposes. This specific inclusion shows that, while saké and similar products do not resemble beer, ale, porter or stout, Congress intended that such products are to be considered fermented products and taxed at the beer rate. In all cases, the IRC definition of beer hinges "fermentation."

C. What Are Nonbeverage Distilled Spirits?

Distilled spirits have thousands of nonbeverage and industrial uses. Distilled spirits are used in solvents, medicines, flavor manufacture, pharmaceutical products, cleaning products, food products, fuels, ink, and many other ordinary items. Generally, the IRC does not require payment of the excise tax, or it permits rebate of most of the excise tax, when distilled spirits are used for nonbeverage or industrial purposes.

Under IRC § 5131, a person may use taxpaid distilled spirits in the manufacture of medicines, medicinal preparations, food products, flavors, flavoring extracts, or perfume.

The excise tax treatment of distilled spirits used in "nonbeverage" products is different because these products are "unfit for beverage use;" i.e., an ordinary person would not consume these products for beverage purposes. This criterion does not, however, require that nonbeverage products be poisonous or harmful if consumed, and, indeed, nonbeverage products deemed "unfit for beverage use" are often used to produce food and beverage products intended for human consumption.

D. How Are Flavored Malt Beverages Different than Other Malt Beverages?

Flavored malt beverages are produced at breweries and taxpaid as beer. However, as previously stated, most flavored malt beverages differ from traditional brewery products:

- The beer base is treated to remove taste, aroma, bitterness, and extracts, leaving a base;
- Their taste is derived from added flavors rather than from fermentation of malt and other fermentable materials;
- They have low carbonation;
- They are clear in color, or their color is derived from added flavoring or coloring materials;
- Their alcohol content is derived in large part from the distilled spirits contained in the added flavoring materials, rather than from the fermentation of malt and other materials.

The last characteristic not only sets flavored malt beverages apart from other malt beverages, but also raises the question of whether they should be classified as beer or as distilled spirits.

III. Flavored Malt Beverages Study

A. What Was the Study's Intent?

In order to address the question of the classification of flavored malt beverages, we examined the formulation of 114 alcohol beverage products labeled and marketed as flavored malt beverages. The intent of this study was to find out how these products are produced, what ingredients are used, and where the alcohol in them is derived. This study did not examine malt beverages that are labeled and marketed as flavored beers, flavored ales, and so forth since these types of malt beverages typically have the character of malt beverages and their alcohol is derived primarily from fermentation.

Please note: Since this study examined individual formulas and production batch records furnished by brewers, it contains confidential, proprietary information that is protected from unauthorized disclosure under IRC §§ 6103 and 7213, and under the Trade Secrets Act, 18 U.S.C. 1905. Thus, by law, we cannot furnish this study to the public, either on request or under the Freedom of Information Act, without pervasive redactions.

B. What Were the Study's Findings?

For each flavored malt beverage, we examined batch records to determine:

(1) The amount of alcohol derived from alcohol flavors added during production, (2)

the amount of alcohol derived from fermented material produced at the brewery, and (3) the volume of beer base present in the flavored malt beverage. For the 114 different flavored malt beverages studied, we found the following:

Table 1: Alcohol Derived from Added Alcohol Flavoring Materials

Alcohol Percentage Derived From Added Alcohol Flavors	Number of Flavored Malt Beverages
0 – 25%	4
26 – 50%	0
51 – 75%	5
76 – 100%	105
Maximum Alcohol Derived From Added Alcohol Flavors: 99.98%	Total: 114

Table 2: Volume of Beer Base Present in Flavored Malt Beverages

Volume of Flavored Malt Beverage Derived From Fermented Beer Base	Number of Flavored Malt Beverages
0 – 25%	95
26 – 50%	4
51 – 75%	1
76 – 100%	14

C. What Conclusions Have We Drawn from this Study?

It is clear from the study's findings that the great majority of the alcohol in most flavored malt beverages is not derived from fermentation of malt and grain. Instead, it is very clear that most of these products' alcohol is derived from distilled spirits contained in added alcohol flavorings. We found that over 75% of the alcohol in most of the flavored malt beverages studied is derived from alcohol flavoring

materials, and that in some cases, this figure rose to more than 99%. In contrast, the alcohol derived from flavorings constitutes less than 25% of the overall alcohol in only 4 of the 114 products studied.

A second finding from this study is that most flavored malt beverages contain very little actual beer. Only 15 out of the 114 flavored malt beverages studied contain as much as 50% by volume fermented beer; the remainder of their volume consists of flavors, water, and other ingredients. Two of the flavored malt beverages studied contain only 1% fermented beer by volume.

IV. Establishing a Standard for Added Alcohol

A. ATF Ruling 96-1

As noted in Reader's Note "A" above, references to ATF refer to the agency as it existed in the Department of the Treasury before January 24, 2003. Please note that while the former ATF issued this ruling, it remains in effect and all references to ATF in the ruling should be considered references to TTB. See the Homeland Security Act of 2002, Public Law 107-296, § 1912 (November 24, 2002).

This ruling may be accessed on the TTB Web site at:

<http://www.ttb.gov/alcohol/info/revrule/revrulex.htm>.

For many years, ATF and its predecessors have allowed brewers to use alcohol flavoring ingredients when producing malt beverages. In fact, ATF recognized this practice in 1996 by issuing Ruling 96-1 (ATF Quarterly Bulletin 1996-1, p. 49). For malt beverages in excess of 6% alcohol by volume (alc/vol), the ruling establishes that a maximum of 1.5% alc/vol may be derived from alcohol flavoring materials. The ruling does not establish a limit on alcohol derived from

flavoring materials for malt beverages under 6% alc/vol. Ruling 96-1 also states that ATF would initiate future rulemaking to consider the prohibition, restriction, or limitation on the use of flavor materials containing alcohol at any stage in the production of malt beverages, but that "pending completion of rulemaking, ATF will allow the continued production or importation of fermented beverages which contain alcohol not solely the result of fermentation at the brewery * * *."

B. Standard for Added Alcohol and Alcohol From Fermentation

Neither the IRC nor the FAA Act provides a clear statement as to how much, if any, of a beer's or a malt beverage's overall alcohol content may come from added flavors or other alcohol-containing materials or, conversely, how much of their alcohol content must result from fermentation at the brewery. While neither statute sanctions the direct addition of distilled spirits or other alcohol to beer or malt beverages, we and our predecessors have long allowed flavors, including flavors containing alcohol, to be added to these products. For example, flavors may be added to beer to provide a particular flavor character.

Many States have urged us to define flavored malt beverages and establish regulatory limits on the addition of alcohol to beer and malt beverages through the use of flavors. In the absence of such a Federal definition and regulation, several States have said that they will develop their own definitions for flavored malt beverages.

We believe that the definition of "beer" in the IRC, which refers to beer, ale, porter, stout, and "other similar fermented beverages," requires that a product must derive a substantial portion of its alcohol from fermentation at a brewery since the

definition does not contemplate a product that derives most of its alcohol content from distilled spirits. As our study shows, very few products currently marketed as flavored malt beverages meet this standard.

We also believe that a similar standard should apply to the definition of "malt beverage" under the FAA Act, which defines a malt beverage as a product made from the fermentation of malted barley with hops. While the definition in the Act allows for the addition to malt beverages of "other wholesome food products" such as flavors, we do not believe that Congress intended for such added materials to be a malt beverage's dominant ingredient or source of most of its alcohol content.

For these reasons, the Treasury Department and TTB propose to delineate how much of the alcohol content of a beer or malt beverage must be derived from fermentation at the brewery, and how much of the product's alcohol content may be derived from alcohol added through the use of flavors and other ingredients containing alcohol.

C. What Is the Significance of 0.5% Alcohol by Volume?

The Department of the Treasury and TTB consider one-half of one percent alcohol by volume (0.5% alc/vol) to be the dividing point between an alcohol beverage subject to internal revenue tax and a beverage containing alcohol that is not subject to tax as an alcohol beverage. This dividing point is recognized in IRC § 5052, which defines beer as containing one-half percent alcohol or more by volume.

While the IRC does not establish an alcohol content threshold for wine or distilled spirits, TTB regulations at 27 CFR 24.10 use the same threshold, 0.5% alc/vol, as the distinction between a taxable wine and a beverage that is not subject to tax as

wine on removal from a winery. In sum, the Treasury Department and its alcohol taxation agencies have historically used the 0.5% alcohol by volume threshold as a dividing line between alcohol products subject to one type of taxation or another.

The presence of alcohol in many beverage products is widespread, from juice, soft drinks, and soda, to cereal beverages made by brewers. For soft drinks and some other beverages, the small amount of alcohol present is usually derived from the use of flavoring materials containing distilled spirits. However, where the alcohol content in such a beverage product reaches 0.5% alc/vol, the product would be subject to the internal revenue excise tax for distilled spirits products. Such beverage products containing as much as 0.5% alc/vol clearly meet the statutory definition of distilled spirits.

In the absence of specific statutory language stating otherwise, we believe that IRC § 5052 supports a regulation classifying any beer or malt beverage product containing 0.5% or more alcohol by volume that is derived from distilled spirits, or from distilled spirits in the form of flavors or other materials, as a distilled spirits product. Under our proposed rule, such products would be taxed and classified as distilled spirits.

We welcome comments on other limits that may be appropriate for the addition of alcohol through flavoring or other materials to beer or malt beverage products. For example, we believe that IRC § 5052 also would support the issuance of a regulation requiring that a beer or malt beverage product must directly derive a majority of the alcohol in a product taxed as beer from fermentation. In other words, less than 50% of the alcohol in a beer or malt beverage could come

from alcohol added through flavoring or other materials. We would also welcome comments relating to the affect of our proposed regulation on the viability of products currently on the market. We are particularly interested in comments addressing whether products on the market could be made currently under our proposed standard, or if not, on the time required to implement such a standard.

V. Proposed Rule Language for Beer

A. Proposal for Alcohol Flavors in Beer

The Treasury Department and TTB propose to establish a new production standard for beer in their regulations issued under the IRC. Under proposed 27 CFR 25.15, to be taxed as "beer" a product must contain less than 0.5% alc/vol derived from added materials, including flavorings, that contain distilled spirits. An alcohol beverage containing 0.5% or more alc/vol derived from distilled spirits in flavors or other materials will be considered distilled spirits. Such an alcohol beverage must be produced at a distilled spirits plant, must be taxpaid at the rate applicable to distilled spirits products, must be labeled and advertised as a distilled spirits specialty, and must be distributed by persons holding basic permits as wholesalers of distilled spirits.

B. Comments Sought on Beer Definition

We request comments on this proposed standard for beer. Specifically, we solicit any studies, laboratory trials, or other empirical data that may exist for added alcohol in flavored malt beverages. We seek comments on how adoption of this proposed added alcohol standard would affect taste, shelf life, stability, or other characteristics of these products.

We also seek comments on whether production practices are available to produce flavored malt beverages with the desired product profile and still comply with the proposed standard. Finally, we seek comments on whether another standard, such as a standard requiring that a minimum of 51% of the alcohol in a malt beverage be derived from fermentation at the brewery, would be more appropriate for these products. Any suggestions or comments for differing added alcohol standards should be backed with data, facts, or studies to support the suggestion. We also encourage you to provide any other useful information or opinions on this issue.

Since any standard applied would be a substantial change from existing regulations and policy, we also seek comment on the amount of time required to comply with any new rule that limits the amount of alcohol that may be added to products taxed as beer. Comment should be directed toward the amount of time necessary to develop and implement new formulas for these products, and possible costs involved.

VI. Proposed Standards for Flavored Malt Beverages

A. How Does the Presence of Alcohol Flavors Affect Malt Beverages?

The FAA Act definition of "malt beverage" was intended to cover all products made by brewers at the time of the FAA Act's enactment in 1935. This definition requires that a malt beverage be made from the fermentation of malted barley with hops, with or without the addition of "other wholesome food products." For years brewers have used many substances including starches, sugars, honey, fruits, flavors (including those containing alcohol), colors, and adjuncts to aid in

fermentation, clarification, and preservation of malt beverages. Federal alcohol regulation and tax agencies, including the former ATF and the new TTB, have allowed these ingredients in malt beverage products.

Federal administrators of the FAA Act have seldom examined the question of what constitutes "wholesome food products" other than to state that the substances added to malt beverages must be sanctioned as safe for food use by the Food and Drug Administration and have some intended purpose in the production of a malt beverage. We and our predecessors have considered flavorings containing distilled spirits to be wholesome food products and have allowed their use in producing malt beverages.

The extensive use of flavors containing distilled spirits introduces a significant amount of distilled spirits into a malt beverage. Adding alcohol or distilled spirits in this fashion reduces the need to use fermented malt in the production of a malt beverage in order to acquire alcohol content. When carried to extremes, the result is a product in which much of its alcohol content comes from added flavorings rather than from fermentation at a brewery and a product in which less than half of its overall volume is a result of fermentation.

We believe that the definition of flavored malt beverages in the FAA Act supports limiting the amount of alcohol in the beverage that is not "made by the alcoholic fermentation * * * of malted barley with hops * * *." Further, we believe that to label a beverage that derives most of its alcohol content from added alcohol flavors as a malt beverage is inherently misleading since consumers would expect

that malt beverages derive a significant portion of their alcohol content from fermentation of barley malt and other ingredients at the brewery.

B. Proposal for Alcohol Flavors in Malt Beverages

Thus, the Department of the Treasury and TTB propose to adopt a standard for malt beverages that limits the alcohol content derived from alcohol flavorings and other materials to less than one-half of one percent alcohol by volume (0.5% alc/vol).

We propose to add a new section, § 7.11, Standards for malt beverages, that specifies this limit. We welcome comments on this proposed standard and on other possible standards, which are consistent with the FAA Act definition of malt beverage, such as requiring that the alcohol content of a malt beverage be "predominantly;" i.e.; at least 51%, derived from fermentation at the brewery. We further seek comments on the time required to implement any such added alcohol standard for malt beverages.

VII. Proposed Alcohol Content Labeling Statement for Flavored Malt Beverages

A. Differentiation of Flavored Malt Beverages from other Alcohol and Nonalcohol Beverages

Due to the unique character of these new types of flavored malt beverages many consumers have limited experience with them. At the same time, due to their label appearance and the use of the brand names of well-known distilled spirits, we believe that consumers are likely to be confused as to their actual alcohol content. We believe that consumers are likely to assume that some flavored malt beverages are high in alcohol content like the distilled spirits whose brand names they bear. Likewise, while other brands of flavored malt beverages are not labeled with

distilled spirits brand names, their labeling or packaging, which often resembles that of nonalcoholic new age beverages such as juices, sodas, bottled water, and energy drinks, is likely to confuse consumers as to their identity as alcohol products.

Because of the likely consumer confusion over the actual alcohol content, or range of alcohol, in flavored malt beverages, we believe that a mandatory requirement to label these products with their alcohol content will provide substantial consumer benefit. We believe labeling flavored malt beverages with their alcohol content will help consumers identify them as malt beverages and will help consumers to understand that their alcohol content is similar to that of traditional malt beverages. Alcohol content labeling would also help draw attention to any flavored malt beverages that might lie outside the customary 4 to 6% alcohol by volume range for malt beverages. For example, if a flavored malt beverage contains 10% alc/vol, alcohol content labeling would inform consumers about this important distinction.

Since there is no regulatory provision in part 7 that uniquely identifies flavored malt beverages, we propose that mandatory alcohol content labeling apply to any malt beverage that contains alcohol from a source other than from fermentation at a brewery. For example if a brewer adds a flavoring containing alcohol to a malt beverage, whether it is labeled as a flavored malt beverage, a flavored beer or ale, or a specialty malt beverage product, the requirement to display alcohol content on the label would apply.

B. Alcohol Content Statement on Brand Label

Beyond simply requiring the alcohol content to be displayed on labels of flavored malt beverages, we believe additional benefit accrues to consumers when it appears on the brand label. Since the brand label is the most prominent label, and is the principal display panel on the package, consumers are more likely to read information, including alcohol content information, displayed on the brand label as opposed to information appearing on the back label. Thus, we propose to amend § 7.22(a) to require that you list the alcohol content of a flavored malt beverage on its brand label. This proposed requirement differs from that for alcohol content labeling for other malt beverages since, under § 7.22(b), the alcohol content statement may appear on any label.

C. Form of Alcohol Content Statement and Tolerances

We propose no changes to the form of the alcohol content statement or the tolerances provided in § 7.71, or to the type size requirements in § 7.28.

With regard to the actual statement of alcohol content, § 7.71(a)(3) requires labeling with the percentage of alcohol by volume, which may be expressed in one of several ways: (1) "Alcohol X percent by volume;" (2) "alcohol by volume X percent;" (3) " X percent alcohol by volume;" or (4) " X percent alcohol/volume." You may use the abbreviations "alc" and "vol" and the symbol "%" in lieu of "percent."

Tolerances are prescribed at § 7.71(c). This section allows alcohol content of a malt beverage to vary by plus or minus 0.3% from the stated label alcohol content.

Type size requirements for statement of alcohol content appear in § 7.28(b)(3). For containers of ½ pint or less, the minimum type size is 1 mm. For

containers larger than ½ pint, the minimum size is 2 mm. Type size may not exceed 3 mm for containers of 40 fl. oz. or smaller, or exceed 4 mm for containers larger than 40 fl. oz.

D. Effect of State Law

In the case of all malt beverages, the penultimate clause of the FAA Act makes Federal labeling regulations applicable only to the extent that State law imposes similar requirements on malt beverages sold within the State. Specifically, the proposed regulations apply to malt beverage labeling and advertising in interstate commerce only to the extent that State law imposes similar requirements on malt beverages that are exclusively intrastate. You must comply with these regulations to the extent that the State imposes similar requirements on malt beverages that are to be consumed or sold within that State. For example, if a State law requires that the alcohol content statement appear in a form different than provided by Federal regulations, then State law will govern the labeling of malt beverages sold or introduced into commerce in that State.

E. Discussion of Alcohol Content Labeling for All Malt Beverages

In Rubin v. Coors Brewing Co., 514 U.S. 476 (1995), the U.S. Supreme Court upheld a lower court ruling in favor of Coors Brewing Co., which had challenged the provisions of the FAA Act and 27 CFR part 7 regulations prohibiting statements of alcohol content on malt beverage labels. The Court found that brewers have a right to inform consumers of their products' alcohol content. Since this 1995 Supreme Court ruling, we added § 7.71 to the part 7 malt beverage

labeling and advertising regulations to permit the optional listing of alcohol content on malt beverage labels. (See T.D. ATF-339, 58 FR 21228.)

We believe that there are good reasons to require labels of all malt beverages to bear an alcohol content statement; however, we are not proposing to do so in this notice. To the maximum extent possible, we wish to restrict this notice of proposed rulemaking to proposals concerning flavored malt beverages and not further complicate this notice with proposals that relate to all malt beverages. Thus, we propose to require mandatory alcohol content labeling only for malt beverages that contain alcohol from added flavors or other material containing alcohol. We may examine the question of mandatory alcohol content labeling for all malt beverages in a future notice of proposed rulemaking.

VIII. Use of Distilled Spirits Terms in Malt Beverage Labeling and Advertising

A. Background

Some newer flavored malt beverages use the names of well-known brands of distilled spirits as part of their own brand names. The labels of these flavored malt beverage brands are also often designed to resemble the labels of the distilled spirits brand used in their name. In addition, when first introduced, some of these flavored malt beverages bore label statements referring to the class and type of distilled spirits used in producing the nonbeverage flavoring component.

For these reasons, many State regulatory and taxing authorities questioned the classification of flavored malt beverages and requested that we take action to clarify their status as either malt beverages or distilled spirits.

B. ATF Ruling 2002-2

In response to these concerns, ATF issued Ruling 2002-2 on April 8, 2002.

Please note that while the former ATF issued this ruling, it remains in effect and any references to ATF in the ruling should be considered references to TTB. This ruling may be accessed on the TTB Web site at:

<http://www.ttb.gov/alcohol/info/revrule/revrulex.htm>.

ATF issued this ruling to clarify permissible labeling and advertising practices for flavored malt beverages, and to give brewers and importers labeling guidelines that would serve to prohibit the misleading impression that flavored malt beverages are distilled spirits or contain distilled spirits. ATF also restated the holdings made in Ruling 96-1 concerning the use of alcohol flavorings in producing flavored malt beverages and concerning the requirements for filing statements of process for malt beverages. With respect to labeling and advertising of malt beverages, Ruling 2002-2 held:

- Held, for brand names.
 - The use of a brand name of a distilled spirits product as the brand name of a malt beverage is not in itself misleading.
 - The use of a distilled spirits term found in the standards of identity in 27 CFR part 5 such as whisky, rum, vodka, brandy, gin, and so forth, as the brand name for a malt beverage is misleading. ATF will not approve labels where a distilled spirits term is used as the brand name for a malt beverage.
 - The use of a coined term that is similar to or resembles a class and type of distilled spirits as part of the brand name for a malt beverage will be examined on a case-by-case basis to determine if it is misleading as to the identity of the product.
- Held, for class and type statements including statements of composition and fanciful names.

- The use of a distilled spirits terms found in the standards of identity in 27 CFR part 5, or the use of a distilled spirits brand name, in the statement of composition or in the fanciful name for a flavored malt beverage is misleading as to the identity of the product. ATF will no longer approve labels where distilled spirits terms or brand names appear in the fanciful name or the statement of composition for a malt beverage.
- Use of a cocktail term as the fanciful name of a malt beverage is not misleading if there is no misleading impression about the identity of the product, based on the overall labeling and advertising of the product.
- Held, for all other labeling and advertising statements.
 - The use of any distilled spirits terms found in the standards of identity in 27 CFR part 5, or of distilled spirits brand names, appearing in any other place on a malt beverage label or in an advertisement for a malt beverage will be presumed to be misleading. Examples of statements that will be presumed to be misleading include:
 - “Tastes like rum.”
 - “The flavor of brandy.”
 - “Serve like a liqueur.”
 - “Made by Old Sourmash Whisky Company, City, State.”
 - Use of cocktail terms on a label or advertisement for a malt beverage is not in itself misleading if there is no misleading impression about the identity of the product, based on the overall labeling or advertising of the product.

C. Proposal for Labeling and Advertising

We propose to amend §§ 7.29 and 7.54 to incorporate the provisions of Ruling 2002-2. Although brewers and importers have revised their labels and advertising to comply with the ruling, we wish to place these provisions in our part 7 regulations. By doing so, you may more easily refer to, and comply with, these labeling and advertising provisions. Moreover, by proposing these requirements,

the public, the alcohol beverage industry, and State regulatory agencies will have the opportunity to comment and provide input on these regulations.

In 1968, ATF added provisions to the regulations in Part 4, Labeling and Advertising of Wine, to prohibit labeling and advertising statements that imply that wine products are similar to distilled spirits, or imply that wine is made with or contains distilled spirits. (See §§ 4.39 and 4.64.) We propose to add similar language to the malt beverage regulations at §§ 7.29 and 7.54. These proposed part 7 regulatory provisions would prohibit a labeling or advertising statement or representation which tends to create the impression that a malt beverage:

- Contains distilled spirits (other than from "nonbeverage" flavors containing alcohol),
- Is similar to a distilled spirit, or
- Has intoxicating qualities.

A statement of alcohol content on a malt beverage label is permitted under this proposal. In accord with Ruling 2002-2, the use of a brand name of a distilled spirits product as the brand name of a malt beverage is permitted. However, the use of a distilled spirits brand name in any other malt beverage labeling or advertising contexts would be prohibited under this proposal. The use of a cocktail name would not be considered a reference to distilled spirits if the overall formulation, label, or advertisement does not present a misleading impression about the identity of the product.

We welcome comments on this proposal.

IX. Filing Formulas for Fermented Beverages

A. Current Statement of Process Requirement

Existing regulations at 27 CFR 25.67 require you to file a statement of process with TTB's National Revenue Center in Cincinnati, Ohio as part of your Brewer's Notice for any fermented beverage that you intend to market under a name other than "beer," "lager," "ale," "porter," "stout," or "malt liquor." Under § 25.76, you must file an amended Brewer's Notice if you make changes to an approved statement of process.

When you file a statement of process with the National Revenue Center, a specialist at TTB's Advertising, Labeling and Formulation Division in Washington, DC examines the proposed statement of process in order to ensure that authorized materials will be used, to determine the correct class and type, and to ensure that the fermented product may be made at a brewery.

B. Regulatory Proposal for Filing a Formula

We wish to describe more clearly the fermented products for which you must file a formula. Additionally, we believe that all brewers should be able to file their statements of process or formulas directly with our Advertising, Labeling and Formulation Division in Washington, DC. For these reasons, we propose to replace the statement of process requirement found at §§ 25.62 and 25.67 with a formula requirement.

1. Requirements for Filing Formulas

We believe current §§ 25.62 and 25.67, which require you to file a statement of process for any product not marketed as a "beer," "ale," and so forth, are vague and lead to questions as to when a formula is required. For example, if you intend

to produce a flavored beer, you have been required to file a formula although this requirement is not clear in the current regulation. Similarly, if you add coloring or flavoring material to a product that you intend to market as a beer, it is unclear if you are required to file a statement of process when, in fact, you are required to file one because of the use of these added materials.

Proposed § 25.55 requires you to file a formula with TTB for certain fermented products that you intend to make at your brewery. For the purposes of tax classification and label evaluation, products for which you must file a formula include: saké, flavored saké, and sparkling saké, products to which you add any material containing alcohol such as nonbeverage flavors, products to which you add coloring or natural or artificial flavors, or any product to which you add fruits, herbs, spices, or honey.

Under this proposed rule, you must also file a formula for any fermented product that will undergo special processing or filtration, or undergo any other process not used in traditional brewing. The use of reverse osmosis, ion exchange treatments, filtration that changes the character of beer or removes material from beer, concentration or reconstitution of beer, and freezing or superchilling of beer, are examples of processes for which you must file a formula with TTB. You are not required to file a formula for traditional brewing processes such as pasteurization, filtration prior to bottling, filtration in lieu of pasteurization, centrifuging (for clarification), lagering, carbonation, and the like.

You must currently file your formula prior to producing the fermented product at your brewery. Proposed § 25.55(c) permits you to produce certain fermented

beverages for research and product development purposes without receiving formula approval. Under proposed § 25.55(c), you could not sell or market these products until receiving formula approval.

2. Filing Formulas

Under the proposed rule, you must file your formula in duplicate directly with TTB's Advertising, Labeling and Formulation Division in Washington, DC. After approval, we will return one copy to you. You may make copies of this approved formula for use at any of your breweries where the formula is valid. A copy of this formula will become part of the required records kept at any individual brewery where you make products using the formula. These proposed regulations do not require a Government form for your formula, although we are considering use of a form like ATF Form 5120.29, Formula and Process for Wine, or requiring both beer and wine formulas to be filed on this form.

Under the proposed rule, you may file one formula to cover production of a fermented product made at any brewery that you own or operate. You may not use your approved formula to cover production of a fermented product at a brewery that you do not operate, such as when you have beer produced for you under contract by another brewer. Also, when you file a formula to cover production of a fermented product at more than one of your breweries, you must identify each brewery where the formula is valid by including each brewery's name, address, and brewery registry number on the formula.

3. Information Required in Formulas

Proposed § 25.57 lists the information that you must include in a formula. This section spells out this information in more detail than does existing §§ 25.62 and 25.67 relating to statements of process. Proposed § 25.57 also requires you to provide information required in your statements of process by Rulings 94-3, 96-1, and 2002-2.

Under the proposed rule, your formula must list each ingredient used in the production of a fermented product and the quantity of that ingredient or a range of the quantity. If you indicate use of a range of an ingredient, the range may not be so wide as to render the formula meaningless. For example, a formula that indicates use of ingredients as "water 0-100 gallons, flavors 0-10 gallons, beer base 0-500 gallons," has limited value in determining what kind of product will be made. Therefore any range of ingredients indicated in a formula must be "reasonable." We seek comment on means to quantify in the regulations what a "reasonable" range of ingredients should be.

If flavors are present in your fermented product, you must include: (1) The name of the flavor; (2) the product number, if any; (3) the name and location of the flavor manufacturer; (4) the TTB or ATF formula number and approval date, if any, of the flavor; (5) and the alcohol content of the flavor.

If you use flavors containing alcohol, or other ingredients containing alcohol, proposed § 25.57 imposes additional requirements. You must indicate in your formula: (1) The volume and alcohol content of the beer base; (2) the maximum volumes of flavors or other ingredients containing alcohol; (3) the alcohol strength of flavors or other materials containing alcohol; (4) the alcohol contribution to the

finished product made by flavors and ingredients containing alcohol; and (5) the final volume and alcohol strength of the finished product. We will use this information to determine the amount of alcohol in a fermented product that is not derived from fermentation at the brewery and whether the proposed product meets the proposed definition of beer in this notice.

Under the proposed rule, you must also describe in detail any special process that you use in producing your fermented product. This information will help us to determine whether a particular process may be distillation and thus not eligible to be conducted on brewery premises. It will also help us determine the product classification of a proposed brewery product.

4. Superseding Formulas

Under proposed § 25.58, you must file a formula superseding an existing formula if you change a product's ingredients or production process. In this case, "change" means to add a new ingredient or process, to eliminate an ingredient or process, or to change the quantity of an ingredient outside of an approved range. When you file a superseding formula you may give it the same serial number as the superseded formula, but you must indicate that it is a superseding formula, such as "Formula No. 2, Superseding, 3-04-2003." We will cancel a formula that you supersede.

5. Previously Approved Statements of Process

Your previously approved statements of process (SOP) will remain valid after the adoption of these regulations provided the finished product under the SOP is in compliance with the new requirements relating to the definition of beer in proposed

§ 25.15. You will not need to notify us or take any other action regarding these documents. After these regulations become effective, you must comply with the formula requirements or supercede statements of process for any new formulas that you intend to use.

C. Comments Sought on Formula Proposal

We welcome comments on the proposed regulations for the preparation and filing of formulas. We are especially interested to know if the proposed system will be easier and less confusing than the present statement of process requirement.

X. Samples

We propose to add a new section, § 25.53, regarding the submission of samples. This section recognizes our authority to require a brewer to submit a sample of a beer or an ingredient used for producing beer. We occasionally examine samples of beer or ingredients in conjunction with our review of statements of process or formulas and in order to determine the proper tax classification of fermented products. This proposal merely incorporates this existing statutory authority in our part 25 regulations.

XI. Formulas and Samples for Imported Malt Beverages

We propose amending § 7.31 by placing in the part 7 regulations our statutory authority to require an importer to submit a formula to us in conjunction with the filing of a certificate of label approval, ATF Form 5100.31. Similarly, we propose to place in the part 7 regulations our authority to require importers to submit samples of a malt beverage or samples of ingredients used in producing a

malt beverage. Occasionally, we must examine a statement of process or analyze samples of a malt beverage in order to determine the proper classification of a product, whether a particular product is a malt beverage, or whether a product is correctly labeled under part 7 regulations. We welcome comments on this proposal.

XII. Public Participation

A. Comments Requested

The Department of the Treasury and TTB request comments from all interested parties on the proposals contained in this notice.

We specifically request comments on other standards or approaches that would be appropriate as an alternative or addition to any final rule, including one that would limit the presence of alcohol derived from added flavors or other materials to not more than 49% of the alcohol volume of the finished product. In developing the final rule, Treasury and TTB will carefully re-evaluate the proposed standard in light of all comments and suggested alternative standards and approaches and will adopt the most appropriate standard or approach.

We also specifically request comments on:

- The proposed amendments to our regulations relating to the production, labeling, and composition of products marketed as flavored malt beverages;
- The proposed definitions for beer and malt beverages requiring these products to be composed primarily of alcohol from fermentation and that limit the contribution of alcohol from added flavors or other ingredients containing alcohol to less than 0.5% alcohol by volume;

- The proposed requirement that malt beverages containing alcohol derived from added flavors or other ingredients containing alcohol bear a mandatory alcohol content statement on their brand labels;
 - Whether products currently on the market could be made under our proposed standard or under an alternative standard;
 - The amount of time required to comply with any new restrictions on adding alcohol to beer and malt beverages;
 - The new formula filing requirements for brewers and importers who wish to produce or import beer or malt beverages containing added flavors, added colors, or which undergo processing not customary in the production of traditional beers; and
 - While we believe that our proposal is consistent with the definitions in the Internal Revenue Code and the FAA Act, flavored malt beverages that contain a significant amount of added alcohol may not have been contemplated by Congress at the time of the statutes' enactment.
- Therefore, we also seek comments on whether Treasury and TTB should seek legislation that would specifically address the treatment of such products, and whether such legislation is necessary to avoid unintended economic consequences of the application of the statute under this rule.

We also specifically request comments on the clarity of the proposed regulations and how they may be made easier to understand.

B. What Is a Comment?

In order for a submission to be considered a “comment,” it must clearly indicate a position for or against the proposed rule or some part of it, or must express neutrality about the proposed rule. Comments that use reasoning, logic, and, if applicable, good science to explain the respondent’s position are most persuasive in the formation of a final rule.

To be eligible for consideration, comments must:

- Contain your name and mailing address;
- Reference this notice number;
- Be legible and written in language generally acceptable for public disclosure;
- Contain a legible, written signature if submitted by mail or fax; and
- Contain your e-mail address if submitted by e-mail.

To ensure that the public is able to access our office equipment, comments submitted by fax must be no more than five pages in length when printed on 8½ by 11 inch paper. Comments submitted by mail or e-mail may be of any length.

C. How May I Submit Comments?

By mail: You may send written comments by mail to the address shown in the **ADDRESSES** section of this notice.

By fax: You may submit comments by facsimile transmission to 716-434-8041. We will treat faxed transmissions as originals.

By e-mail: You may submit comments by e-mail by sending the comments to nprm@ttb.gov. We will treat e-mailed transmissions as originals.

By online form: You may also submit comments using the comment form provided with the online copy of this proposed rule on the TTB Web site at <http://www.ttb.gov/alcohol/rules/index.htm>. We will treat comments submitted via the Web site as originals.

Public Hearing: Any person who desires an opportunity to comment orally at a public hearing on the proposed regulation should submit his or her request in writing to the Administrator within the 90-day comment period. The Administrator, however, reserves the right to determine, in light of all circumstances, whether a public hearing will be held.

D. How Does TTB Use the Comments?

We will carefully consider all comments that we receive on or before the closing date. We will not acknowledge receipt of comments or reply to individual comments. We will summarize and discuss pertinent comments in the preamble of any subsequent notices or the final rule published on this subject.

E. May I Review Comments Received?

You may view copies of the comments received in response to this notice of proposed rulemaking by appointment at the ATF Reference Library, Room 6480, 650 Massachusetts Avenue, NW., Washington, DC 20226, telephone 202-927-7890. You may request copies of the comments at 20 cents per page by writing to the ATF Reference Librarian at the above address.

For the convenience of the public, we will also post comments received in response to this notice on the TTB Web site. All comments posted on our Web site will show the name of the commenter, but will not show street addresses, telephone

numbers, or e-mail addresses. We may also omit voluminous attachments or material that we do not consider suitable for posting. In all cases, the full comment will be available in the ATF Reference Library. To access online copies of the comments on this rulemaking, visit <http://www.ttb.gov/alcohol/rules/index.htm>, and click on the "View Comments" button under this notice number.

F. Will TTB Keep My Comments Confidential?

We cannot recognize any material in comments as confidential. All comments and materials may be disclosed to the public in the ATF Reference Library. We may also post the comment on our Web site. (See "May I Review Comments Received?") Finally, we may disclose the name of any person who submits a comment and quote from the comment in the preamble to a final rule on this subject. If you consider your material to be confidential or inappropriate for disclosure to the public, you should not include it in the comments.

XIII. Regulatory Analyses and Notices

A. Does the Paperwork Reduction Act Apply to this Proposed Rule?

The provisions of the Paperwork Reduction Act of 1995, Public Law 104-13, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320, do not apply to this notice of proposed rulemaking because we are not proposing any new or revised recordkeeping requirements. We are only proposing to clarify when a formula must be filed with TTB and, for the purpose of efficiency, we propose to change the place where within TTB these formulas are filed. In the future, we may develop a specific form for this information collection.

The Office of Management and Budget has previously approved the information collection and recordkeeping provisions contained in proposed §§ 25.55 through 25.58 under OMB control number 1512-0045, in accordance with the requirements of the Paperwork Reduction Act. This information collection and the related recordkeeping requirements are currently contained in §§ 25.62 and 25.67.

B. Does the Regulatory Flexibility Act Apply to this Proposed Rule?

We certify under the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) that this notice will not have a significant impact on a substantial number of entities. We believe that 10 or fewer qualified small breweries actually manufacture flavored malt beverages subject to this rule. We specifically solicit comments on the number of small breweries that may be affected by this rule and on the impact of this rule on those breweries. We ask that any small brewery that believes that it would be significantly affected by this rule to let us know and tell us how it would affect you.

Pursuant to § 7805(f) of the Internal Revenue Code of 1986, we have submitted this regulation to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

C. Is this a Significant Regulatory Action as Defined by Executive Order 12866?

This is not a significant regulatory action as defined by Executive Order 12866. Therefore, the order does not require a regulatory assessment because no effect of \$100 million or more flows from this rule and because any effect flows directly from the underlying statutes.

XIV. Drafting Information

Various personnel of the Alcohol and Tobacco Tax and Trade Bureau and the Department of the Treasury drafted this document.

XV. List of Subjects

27 CFR Part 7

Advertising, Authority delegations, Beer, Consumer protection, Customs duties and inspection, Imports, Labeling, Packaging and containers, Reporting and recordkeeping requirements.

27 CFR Part 25

Beer, Claims, Electronic fund transfers, Excise taxes, Exports, Labeling, Liquors, Packaging and containers, Reporting and recordkeeping requirements, Research, Surety bonds.

XVI. The Proposed Rule

For the reasons set forth in the preamble, the Department of the Treasury and the Alcohol and Tobacco Tax and Trade Bureau propose to amend the regulations in title 27, Code of Federal Regulations, as follows:

PART 7 – LABELING AND ADVERTISING OF MALT BEVERAGES

Paragraph 1. The authority citation for 27 CFR part 7 continues to read as follows:

Authority: 27 U.S.C. 205.

Par. 2. We amend § 7.10 by revising the definition of "malt beverage" to read as follows:

§ 7.10 Meaning of terms.

*

*

*

*

*

Malt beverage. A beverage made by the alcoholic fermentation of an infusion or decoction, or combination of both, in potable brewing water, of malted barley with hops, or their parts, or their products, and with or without other malted cereals, and with or without the addition of unmalted or prepared cereals, other carbohydrates or products prepared therefrom, and with or without the addition of carbon dioxide, and with or without other wholesome products suitable for human food consumption. Standards applying to malt beverages appear in § 7.11.

* * * * *

Par. 3. We amend Subpart B by adding a new § 7.11 to read as follows:

§ 7.11 Standards for malt beverages.

The following standards apply to a fermented product that is considered a malt beverage under this part.

(a) Alcohol flavoring materials and other ingredients containing alcohol may be used in producing a malt beverage provided these alcohol ingredients constitute less than 0.5 percent alcohol by volume (0.5% alc/vol) of the finished malt beverage. For example, a finished malt beverage of 5.0% alc/vol must derive more than 4.5% alc/vol from the fermentation of barley malt and other materials, and must derive less than 0.5% alc/vol from the addition of alcohol flavors or other ingredients containing alcohol.

(b) A malt beverage may be filtered or processed in order to remove color, taste, aroma, bitterness, or other characteristics derived from fermentation.

Par. 4. We amend § 7.22 by adding a new paragraph (a)(5) to read as follows:

§ 7.22 Mandatory label information.

There shall be stated:

(a) On the brand label:

* * * * *

(5) Alcohol content in accordance with § 7.71, for malt beverages that contain any alcohol derived from added flavors or other ingredients containing alcohol.

* * * * *

Par. 5. We amend § 7.29 by revising paragraph (a) and by adding a new paragraph (a)(7) to read as follows:

§ 7.29 Prohibited practices.

(a) Statements on labels. Containers of malt beverages, or any labels on such containers, or any carton, case, or individual covering of such containers, used for sale at retail, or any written, printed, graphic, or other material accompanying such containers to the consumer must not contain:

* * * * *

(7)(i) Any statement, design, device, or representation which tends to create the impression that a malt beverage:

- (A) Contains distilled spirits; or
- (B) Is similar to a distilled spirit; or
- (C) Has intoxicating qualities.

(ii) A label statement of alcohol content in conformity with § 7.71 is not considered a prohibited practice in violation of this section. Use of a brand name of a distilled spirits product as a malt beverage brand name is permitted. Use of a cocktail name as a brand name or fanciful name is permitted if the overall malt beverage formulation and label do not present a misleading impression about the identity of the product.

* * * * *

Par. 6. We amend § 7.31 by adding paragraph (e) to read as follows:

§ 7.31 Label approval and release.

* * * * *

(e) Formula and samples. The Administrator may require you to submit a formula for a malt beverage, and a sample of any malt beverage or ingredients used in producing a malt beverage in conjunction with the filing of a certificate of label approval on ATF Form 5100.31.

Par. 7. We amend § 7.54 by revising paragraph (a) and by adding a new paragraph (a)(8), to read as follows:

§ 7.54 Prohibited statements.

(a) General prohibition. An advertisement of malt beverages must not contain:

* * * * *

(8)(i) Any statement, design, device, or representation which relates to alcohol content or which tends to create the impression that a malt beverage:

(A) Contains distilled spirits; or

(B) Is similar to a distilled spirit; or

(C) Has intoxicating qualities.

(ii) A label statement of alcohol content in conformity with § 7.71 is not considered a prohibited practice in violation of this section. Use of a brand name of a distilled spirits product as a malt beverage brand name is permitted. Use of a cocktail name as a brand name or as a fanciful name is permitted if the overall malt beverage advertisement does not present a misleading impression about the identity of the product.

* * * * *

PART 25 - BEER

Par. 8. The authority citation for part 25 continues to read as follows:

Authority: 19 U.S.C. 81c; 26 U.S.C. 5002, 5051-5054, 5056, 5061, 5091, 5111, 5113, 5142, 5143, 5146, 5222, 5401-5403, 5411-5417, 5551, 5552, 5555, 5556, 5671, 5673, 5684, 6011, 6061, 6065, 6091, 6109, 6151, 6301, 6302, 6311, 6313, 6402, 6651, 6656, 6676, 6806, 7011, 7342, 7606, 7805; 31 U.S.C. 9301, 9303-9308.

Par. 9. We amend § 25.11 by revising the definition of "beer" to read as follows:

§ 25.11 Meaning of terms.

* * * * *

Beer. Beer, ale, porter, stout, and other similar fermented beverages (including saké and similar products) of any name or description containing one-half of one percent or more alcohol by volume, brewed or produced from malt, wholly or in part, or from any substitute for malt. Standards for the beer tax rate appear in § 25.15.

* * * * *

Par 10. We amend Subpart B by adding an undesignated center heading and a new section, § 25.15, to read as follows:

STANDARDS FOR BEER TAX RATE

§ 25.15 What standards must be met to qualify as a fermented product to be taxed at the beer rate?

(a) You may use barley malt, malted grains other than barley, unmalted grains, sugars, syrups, molasses, honey, fruit, fruit juice, fruit concentrate, herbs, spices, and other food materials for fermenting beer.

(b) You may use alcohol flavoring materials, taxpaid wine, and other ingredients containing alcohol in producing beer, provided these alcohol ingredients contribute less than 0.5 percent alcohol by volume of the finished beer. For example, a finished beer of 5.0% alc/vol must derive more than 4.5% alc/vol from the fermentation of ingredients at the brewery. Added flavors or other ingredients containing alcohol may constitute less than 0.5% alc/vol of the finished beer.

Par. 11. We amend Subpart F by adding two undesignated center headings, and by adding new §§ 25.53, and 25.55 through 25.58, to read as follows:

Subpart F – Miscellaneous Provisions

* * * * *

SAMPLES

§ 25.53 Am I required to furnish samples of my fermented products or ingredients?

The appropriate TTB officer may, at any time, require you to submit samples of:

(a) Cereal beverage, saké, or any fermented product produced at the brewery.

(b) Materials used in the production of cereal beverage, saké, or any fermented product.

(c) Cereal beverage, saké, or any fermented product, in conjunction with the filing of a formula.

(26 U.S.C. 5415, 5555, 7805(a))

FORMULAS

§ 25.55 Are formulas required for my fermented products?

(a) For what fermented products must a formula be filed? You must file a formula with TTB if you intend to produce:

(1) Any fermented product that will be treated by any special processing, filtration, or other methods of manufacture that change the character of beer or remove material from beer. The removal of any volume of water from beer, filtration of beer to remove color, flavor, or character, the separation of a beer into different components, reverse osmosis, concentration of beer, and ion exchange treatments are examples of processes that require you to file a formula under this section.

(2) Any fermented product to which taxpaid wine or any flavor or other ingredient containing alcohol will be added.

(3) Any fermented product to which coloring or natural or artificial flavors will be added.

(4) Any fermented product to which fruits, herbs, spices, or honey will be added.

(5) Saké, flavored saké, or sparkling saké.

(b) Are separate formulas required for different products? You must file a separate formula for each fermented product for which a formula is required.

(c) When must I file a formula? (1) Except as provided in paragraph (2), you may not produce a fermented product for which a formula is required until you have filed and received approval of a formula for that product.

(2) You may, for research and product development purposes, produce a fermented product without an approved formula, but you may not sell or market this product until you receive approval of a formula.

(d) How long is my formula approval valid? Your formula approved under this section remains in effect until you supersede it with a new formula, until you voluntarily surrender it to TTB, or until TTB cancels or revokes it.

(e) Are my previously approved statements of process valid? Your statements of process approved before [EFFECTIVE DATE OF FINAL RULE] are considered approved formulas under this section, provided the finished product under the statement of process is in compliance with § 25.15. You do not need to resubmit any approved statements of process.

(26 U.S.C. 5415, 5555, 7805(a))

§ 25.56 How do I file a formula?

(a) What are the general requirements for filing a formula?

(1) You must identify each brewery where the formula is valid by including each brewery name, address, and the brewery registry number for each brewery for which the formula applies.

(2) You must serially number each formula, commencing with "1" and continuing in numerical sequence.

(3) You must date and sign each formula.

(4) You must submit two copies of each formula to TTB.

(b) Where do I file a formula? File your formulas with the Chief, Advertising, Labeling and Formulation Division, Alcohol and Tobacco Tax and Trade Bureau, 650 Massachusetts Avenue, NW., Washington, DC 20226.

(26 U.S.C. 5401, 7805)

§ 25.57 What ingredient and process information must I include on a formula?

(a) For each formula you must list—

(1) Each separate ingredient and the specific quantity used, or a reasonable range of quantities used.

(2) For fermented products containing flavorings, you must include: the name of the flavor; the product number, if any; the name and location (city, State and TTB company code) of the flavor manufacturer; the TTB or ATF formula number and approval date, and the alcohol content of the flavor.

(3) For formulas that include the use of taxpaid wine or other ingredients containing alcohol, you must explicitly indicate:

(i) The volume and alcoholic content of the beer base;

(ii) The maximum volumes of the flavoring materials or other ingredients to be used;

(iii) The alcoholic strength of the flavoring materials or other ingredients;

(iv) The overall alcohol contribution to the finished product provided by the addition of flavoring materials or other ingredients containing alcohol; and

(v) The final volume and alcoholic content of the finished product.

(b) You must describe in detail each process used to produce a fermented beverage.

(c) You must state the alcohol content of the fermented product at each step in production after fermentation, and the alcohol content of the finished product.

(d) At any time, an appropriate TTB officer may require you to file additional information concerning a fermented product, ingredients, or processes, in order to determine whether a formula should be approved, disapproved, or if the approval of a formula should be continued.

(26 U.S.C. 5415, 5555, 7805(a))

§ 25.58 When must I file a new or superseding formula?

(a) You must file a new or superseding formula if you—

(1) Create an entirely new fermented product that requires a formula;

(2) Add new ingredients to an existing formulation;

(3) Delete ingredients from an existing formulation;

(4) Change the quantity of an ingredient used from the quantity or range of usage in an approved formula;

(5) Change an approved processing, filtration, or other special method of manufacture that requires the filing of a formula; or

(6) Change the contribution of alcohol from flavor or ingredients that contain alcohol.

(b) When you file a new or superseding formula with TTB, follow the procedures described above in §§ 25.56 through 25.57.

(c) When you file a new formula, you must give it a new formula number.

(d) A superseding formula is one that replaces an existing formula. You must inform TTB when you file a superseding formula. When TTB approves a superseding formula, we will cancel your previous formula. You may use the same formula number for a superseding formula as the formula it replaces, but you must annotate the formula number to indicate it is a superseding formula (For example, Formula 2, superseding).

(26. U.S.C. 5401)

§§ 25.62 [Amended]

Par. 12. We amend § 25.62 by removing and reserving paragraph (a)(7).

§§ 25.67 and 25.76 [Removed]

Par. 13. We amend Subpart G by removing and reserving §§ 25.67 and 25.76.

Signed: March 4, 2003.

John J. Manfreda,

Acting Administrator.

Approved: March 17, 2003.

Timothy E. Skud,

Deputy Assistant Secretary
(Regulatory, Tariff, and Trade Enforcement).